IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5412 OF 1999

Sharda Synthetics Bombay
P.Ltd., Dombivli, Thane. ... Petitioner.

V/s.

1. Union of India;

2. The Commissioner of Central
Excise, Mumbai-III.

3. The Asstt. Commisioner (Kvss)
Central Excise, Mumbai. ... Respondents.

Mr.Shridharan with Prakash Shah i/b. M/s.Desai,
Doijode and Phatarphekar for the petitioner.

Mrs.S.V.Bharucha for the respondents.

CORAM : V.C.DAGA AND J.P.DEVADHAR, JJ.

RESERVED ON : 6th May 2005

PRONOUNCED ON : 29th June 2005.

JUDGMENT : (Per V.C.Daga, J.)

. The petitioner - company is a manufacturer of Processed Fabrics at its factory at MIDC, Dombivli (East) in the district of Thane which is processed on job work basis for and on behalf of the Merchant Manufactures. Petitioner in due course of its business receives grey fabrics from the Merchant Manufacturers for the purpose of processing. The processed fabrics is liable to additional duty of excise under the Additional Duties of Excise (Goods

of Special Importance) Act, 1957 ("said Act" for short). The petitioner while pressing grey fabrics was following procedure prescribed under Notification No.305 of 1977.

2. Petitioner had filed writ petition being Writ Petition No.2447 of 1990 in the Delhi High Court, inter alia, to restrain the Excise Department from recovering and/or levying additional duty of excise under the said Act, inter alia; on the ground that the said levy was ultra vires Article 366(29A) read with Articles 246 and 274 of the Constitution of India and sought to quash notifications dated 25th November, 1987; 9th December, 1987 and 20th March, 1990 issued by respondent No.1 under the Central Excise Act, 1944 ("Excise Act" for short)

3. The Delhi High Court while admitting the above writ petition was pleased to grant interim relief whereby the petitioner was permitted to clear processed fabrics on payment of 50% of the disputed duty and restrained the respondents from recovering the balance of the disputed duty on petitioner's furnishing bank guarantee of the balance amount.

4. The petitioner, accordingly, paid 50% of the of disputed duty and had furnished bank guarantees for the balance amount of disputed duty amounting to Rs.35,44,614.55 in terms of the interim order of the Delhi High Court.

5. The petitioner went on regularly submitting monthly returns in RT-12 pending the above writ petition. The Excise Authorities did not assess said monthly returns. However, the petitioner claimed that duty was paid under mistake on the Merchant Manufacturers sale price though it was required to pay on the basis of formula laid down by the Supreme Court in the case of **Ujagar Prints v. Union of India,** 39 ELT 535.

6. Ultimately, Delhi High Court was pleased to dismiss the above petition on 9th July, 1991 upholding the constitutional validity of the said Act and permitted the Excise Authorities to encash the bank guarantees furnished by the petitioner by way of security. The Delhi High Court while disposing of the petition ruled that the petitioner shall be liable to pay interest at the the rate of 17.5% p.a.on the balance amount; which was secured

by way of furnishing bank guarantees. Thus, the interest liability came to be crystalised against the petitioner in terms of this order.

7. The Excise Authorities, after disposal of the above writ petition by the Delhi High Court, assessed the monthly returns filed by the petitioner for the period August, 1990 to July, 1991 and, cumulatively, for the said period nationally demanded duty of Rs.35,44,614.55 from the petitioner.

8. The petitioner did not remit the aforesaid amount demanded on the basis of assessment of RT-12 returns since it was secured by bank guarantees. Consequently, the then Assistant Collector of Central Excise, Kalyan-II Division invoked the bank guarantees and called upon the Syndicate Bank, Dombivli to remit the proceeds of the bank guarantees furnished by the petitioner.

9. The petitioner in order to prevent encashment of the bank guarantees filed suit in the Court of learned Civil Judge, Senior Division, Thane being Regular Civil Suit No.649 of 1991. The Second Joint Civil Judge, Senior Division Thane vide its

order dated 23rd October, 1991 refused to grant interim injunction as prayed by the petitioner.

10. The petitioner herein (plaintiff in the suit) filed appeal in the District Court, Thane against the aforesaid order dated 23rd October, 1991. The Sixth Additional District Judge, Thane vide his order dated 30th April, 1991 was pleased to restrain the respondents from encashing bank guarantees till excise duty is assessed and revised as per the clarification given by the Supreme Court in the case of **Ujagar Prints** (supra).

11. Being aggrieved by the above order, the Revenue- respondents filed writ petition before this Court being Writ Petition No.4072 of 1992 to challenge the legality and validity of the aforesaid order passed by the learned Additional District Judge, Thane dated 30th April, 1991. This Court was pleased to issue rule in the said writ petition.

12. During pendency of the petition Government introduced a Kar Vivad Samadhan Scheme, 1998 (KVS Scheme for short) in the Finance (No.2) Bill, 1998 to invite the tax-payers to settle their tax arrears by availing substantial discount in payment of taxes

and also to seek immunity from prosecution. Pursuant to this scheme, the tax payers could file declaration for settling the tax arrears between 1st September, 1998 to 31st January, 1999.

13. The petitioner on 24th November 1998 opted to take advantage of the said scheme by filing declaration in terms of the said scheme. The declaration filed by the petitioner was acknowledged by the office of the Commissioner of Central Excise on 26th December, 1998. However, on 24th February, 1999, the Assistant Commissioner (KVSS) Central Excise, Mumbai-II rejected the declaration filed by the petitioner on the ground that show cause notice as required under the said scheme was never issued to the petitioner.

14. Being aggrieved by the above order rejecting declaration made under KVS Scheme, petitioner has invoked writ jurisdiction of this Court under Article 226 of the Constitution of India.

Submissions :
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15. Mr.Shridharan, learned counsel appearing with Mr.Prakash Shah for the petitioner submitted that the declaration filed by the petitioner under

KVS Scheme was erroneously rejected by respondent No.3 holding that neither any show cause notice was issued nor any demand notice was served on the petitioner. In the submission of Mr.Shridharan, factually, there was a notice of demand pending against the petitioner pursuant to section 173-I of the Central Excise Rules, 1944 ("Excise Rules" for short), which, accordingly to him, did amount to a notice of demand as contemplated under KVS Scheme.

16. Mr.Shridharan while elaborating his submissions submitted that, in each of the monthly returns filed by the petitioner; endorsements/ remarks in the following manner duly authenticated by the concerned Excise Official were made. Specimen of one such endorsement is reproduced hereinbelow for immediate reference:

> "Total duty comes to Rs.33,608/- while you have paid duty of Rs.18,804/-. Please pay the differential duty and intimate this office accordingly as per Delhi High Court decision."

17. Mr.Shridharan, reading the aforesaid endorsement, submits that there was assessment quantifying the differential additional duty which itself constituted a notice of demand for the following reasons:

(a) that the assessment order had precisely and exactly quantified amount of differential duty as a specific sum of money in rupees;

(b) that the said assessment order had unconditionally called upon the petitioner to pay the differential duty;

(c) that the demand made was to pay an ascertained and specific sum of money.

(d) that in the event of failure on the part of the petitioners to pay the differential duty, recovery action under section 11 of the Central Excise Act, 1944 could straightway lie against the petitioner.

18. In the submission of Mr.Shridharan, the monthly returns of the petitioner were not assessed during the pendency of the petition filed before the Delhi High Court. Assessments were made after dismissal of the writ petition though the goods were provisionally cleared during pendency of the petition. According to him, it was obligatory on the part of the Excise Department to pass assessment orders in accordance with the final judgment of the

Delhi High Court in Writ Petition No.2447/1990, following the principles laid down by the Apex Court in the case of **Ujagar Prints** (supra).

19. In the submission of Mr.Shridharan, assuming without admitting that the amounts of differential duties mentioned in RT-12 returns filed by the petitioner though were confirmed with the dismissal of the petition filed in the Delhi High Court; even then it cannot be suggested that in the present case no notice of demand was issued. It is, thus, submitted that provision of section 95(ii)(b) of the Finance (No.2) Act, 1998 was wrongly applied in the case of the petitioner.

20. Without prejudice to the aforesaid contention, learned counsel for the petitioner further submitted that having satisfied the condition of sub-clause (ii) of clause (m) of section 87 of the Finance Act, 1998 in as much as with the determination of the amount of the additional duty due under the Act on 31st March, 1998, a liability to pay unpaid duty was standing against the petitioner, which was the subject matter of unsatisfied demand notice pending against the petitioner on the date of making the declaration.

It is, thus, submitted that both the sub-clauses of clause (m) of section 87 were independently satisfied; though only one of them was enough to avail the benefit of the said scheme. In the submission of the petitioner, the impugned rejection of the declaration filed by the petitioner under KVS Scheme is clearly erroneous and untenable in law. According to Mr.Shridharan, the petitioner had fulfilled all the conditions for being eligible to avail the benefits of KVS Scheme. Thus, according to him, the erroneous order of the designated authority denying benefits of the KVS Scheme has caused substantial loss to the petitioner.

21. Mr.Shridharan, learned counsel for the petitioner, in order to reinforce; emphasis and reiterate his submission, pressed into service rule 173-I of the Excise Rules, which reads thus:

> "**Rule 173I. Assessment by proper officer.-** (1) The proper officer shall on the basis of the information contained in the return filed by the assessee under sub-rule (3) of rule 173G and after such further inquiry as he may consider necessary, assess the duty due on the goods removed and complete the assessment memorandum on the return. A copy of the return so completed shall be sent to the assessee.
>
> (2) The duty determined and paid by the assessee under rule 173F shall be adjusted against the duty assessed by the proper officer under sub- rule (1) and where the

> duty so assessed is more than the duty determined and paid by the assessee, the assessee shall pay the deficiency by making a debit in the account-current within ten days of receipt of copy of the return from the proper officer and where such duty is less, the assessee shall take credit in the account-current for the excess on receipt of the assessment order in the copy of the return duly countersigned by a Superintendent of Central Excise."

On the text of the aforesaid rule, he submits that it was wrong on the part of respondent No.3 to assume that the show cause notice or notice of demand must be under section 11-A of the Excise Act. According to him, once the assessment made under rule 173-I had become final, then there was no need to issue notice under section 11-A of the Excise Act. In support of his submission he relied upon the judgment of this Court in the case of **M/s.Swan Mills Limited v. Union of India**, 1989 (44) ELT 601 (Bom); wherein it was held as under:

> "If we are right in the view that we have taken above, it is clear that once the assessment orders made under Rule 173 I have become final, there was no need to issue notices under section 11A. If the authorities, have inspite of this issued notices also under section 11A for the recovery of the amount due under the said assessment orders, they have indulged in an exercise not warranted by law."

Mr.Shridharan also relied upon the judgment of the Karnataka High Court in the case of **M/s.Chairman**

CBEC and Ors v. Davangere Cotton Mills, 1996 (63)

ECR 244 (Kar); wherein it was held as under:

> " As this court by an interim order restrained the department from levy and collection of excise duty in respect of yarn manufactured by the mills, it was not possible for the officer to the complete the assessment order. The learned single judge, was in error in observing that the department could not have completed assessment in accordance with the provisions of Rule 173 I of the rules after interim order passed by this court came to an end without giving prior notice to show cause before completing the assessment under rule 173I of the Rules. The department has followed the procedure prescribed under Rule 173I and called upon the mills to pay the duty within a period of 10 days. The exercise carried out by the department did not demand prior notice to the assessee.
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> ....
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> 10. .... The assumption of the learned single judge that the adjudication or ascertainment of duty by the department was not permissible without prior service of notice under sub-section 1 of section 11A is entirely incorrect. The further assumption that the stay order issued by the court in an earlier litigation does not dispense with the notice is also inaccurate in as much as there was no occasion to serve any notice under Rule 173 I of the Rules"

Relying on the aforesaid judgments, Mr.Shridharan submitted that in all the above cases there were interim orders passed by the High Court and the assessments were thereafter made under rule 173-I. Thus, in even cases which go to the High Court,

ultimately, assessment has to be done under rule 173-I of the Excise Rules by the proper officer.

22. Mr.Shridharan also pressed into service judgment in the case of **M/s.Serai Kella Glass Works Pvt.Ltd. v. CCE, Patna**, 1997 (91) ELT 497 (SC); wherein the Apex Court observed as under:

> "If the duty paid by the proper officer on final assessment is more than the duty determined and paid by the assessee, the assessee has to pay the deficiency by making a debit in the account-current within ten days of the receipt of the copy of the return from the proper officer. If the duty on final assessment payable by the assessee is less than what he has actually paid, the assessee is entitled to take credit in the account current for the excess payment. No question of any show cause notice under section 11A arises in such as case."

Mr.Shridharan thus submits that once an assessment order passed under rule 173-I of the Excise Rules becomes final, there is no need to issue notice under section 11-A of the Excise Act and that order itself constitutes a notice of demand. According to him, in the present case there was indeed a notice of demand raised under rule 173-I of the Excise Rules. He, thus, submits that the impugned order rejecting the declaration made by the petitioner is liable to be quashed and set aside.

Per Contra:
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23. Mrs.S.V.Bharucha, learned counsel appearing for the respondents-Revenue submits that the endorsement made on RT-12 returns at the time of assessment cannot be considered as notice of demand. In her submission, section 95(ii)(b) of KVS Scheme contemplates that the provisions of KVS Scheme does not apply to the tax arrears under any indirect tax enactment in a case where show cause notice or notice of demand under any indirect tax enactment has not been issued. She submits that in the case on hand no such show cause notice or notice of demand was ever issued or served under section 11-A of the Excise Act. She relied upon the judgment of the Apex Court in the case of **M/s.Metal Forgings v. Union of India**, 2002 (144) ELT 241 (SC); wherein the requirement of show cause notice was held to be mandatory for raising any demand.

24. Mrs.Bharucha further submits that the petitioner itself had filed RT-12 returns. The duty liability was quantified by the petitioner itself in terms of interim order dated 18th September, 1990 passed by the Delhi High Court in Writ Petition No.2447 of 1990. Based on such self assessment, 50% duty was paid by the petitioner and balance 50% duty

liability was secured by way of bank guarantees. The endorsements were made on the RT-12 returns in view of the final order of the Delhi High Court dated 9th July, 1991 whereby the above-noted writ petition was dismissed and recovery of balance amount with interest thereon was directed. Thus, according to her, the RT-12 assessment memorandum was nothing but an act of self assessment. The assessable value was computed by the respondents on the basis of the prices declared by the petitioner itself. In her submission, the endorsement made on RT-12 returns was nothing but a communication to the petitioner showing compliance of the order of the Delhi High Court so as to make it a foundation for invoking bank guarantees furnished by the petitioner. In her submission, writ petition having been decided finally by the Delhi High Court and that order having become final, there was no occasion for raising any additional demand against the petitioner. By making endorsement neither the dispute was settled nor any assessment was made. To put it simply, what was done by the said endorsement was nothing but an intimation of implementation of the final order passed by the Delhi High Court was given so as to report compliance of the writ issued by the Delhi High Court.

25. Mrs.Bharucha further submits that the assessable values having been computed by the respondents on the basis of the prices declared by the petitioner there was no dispute pending between the parties. The petitioner could not have made any grudge or complaint against the said assessment order as the same was passed on the basis of particulars furnished and declared by the petitioner itself. The petitioner by no means could be treated to be a person aggrieved by the said assessment order made on RT-12 returns. In nutshell, she submits that there was no dispute pending between the parties warranting any resolution thereof under KVS Scheme.

26. Mrs. Bharucha further submits that the order passed by the Delhi High Court dismissing the petition and directing payment of balance 50% amount secured by way of bank guarantees with interest thereon has been confirmed by the Supreme Court since the S.L.P. filed against the said order came to be dismissed. According to her, as stated above, no dispute warranting resolution under KVS Scheme was pending.

27. Mrs.Bharucha further submits that as a matter of fact, the petitioner has recovered or collected the differential amount of duty amounting to Rs.35,44,614.55 from its customers. In her submission, the object of KVS Scheme is not to enrich the assessee but to see that he is relieved of his duty liability, may be partially. At the same time, another object is to bring an end to the long pending revenue disputes or litigations.

28. Mrs.Bharucha, alternatively, submits that assuming RT-12 assessments were made, but none of those assessments were challenged by the petitioner contending that they were contrary to law laid down by the Apex Court in the case of **Ujagar Prints** (supra). Consequently, in her submission, those orders of assessment; though made subsequent to the filing of the suit; would operate as res-judicata between the parties since the orders passed thereon were made prior to the decision of the suit in view of Explanation-I to section 11 of the Code of Civil Procedure, 1908.

29. Mrs.Bharucha, on the above canvas, submits that the recovery which was secured by way of bank guarantees against the petitioner was a demand

judicially adjudicated as valid demand; as such there was no dispute in respect of the said demand between the parties. Such undisputed demand was not covered by the provisions of KVS Scheme. She, thus, submits that the provisions of KVS Scheme did not and do not apply to the cases where no appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or Supreme Court on the date of filing of declaration or application for revision under KVS Scheme. The petitioner, as such was not entitled to claim benefit of the KVS Scheme.

30. Mrs.Bharucha further submitted that the Regular Civil Suit No.96 of 1989 filed by the petitioner against the respondents came to be withdrawn by the petitioner. According to her, the subsequent suit filed by the petitioner in the Court of Civil Judge, Senior Division, Thane being Regular Civil Suit No.649 of 1991 to prevent encashment of bank guarantees, was based on separate, distinct and independent contract and it had nothing to do with the excise liability. The entire attempt behind filing of the suit was to frustrate and flout the order of the Delhi High Court whereby encashment of bank guarantees furnished by the petitioner pursuant

to the order dated 18th September, 1990 was directed, which had not only attained finality vide order dated 9th July, 1991, but was subsequently, confirmed by the Apex Court by dismissing the S.L.P. filed against it. As such, according to her, filing of suit and/or writ petition arising therefrom and/or pendency thereof cannot come to the rescue of the petition to contend that any dispute in respect of tax arrears was pending between the parties. According to her, dispute contemplated in the scheme must be a dispute arising under the provisions of the indirect tax legislation. Pendency of civil suit or any other proceeding arising therefrom, may be in the form of civil appeal or civil revision or writ petition, is not contemplated under the KVS Scheme.

31. Mrs.Bharucha further submits that so far as KVS Scheme is concerned, it does not apply to a case pending in the suit in any Court since the pendency of the suit stands specifically excluded from the purview of the scheme. In nutshell, Mrs.Bharucha submits that on the date of filing of declaration by the petitioner neither any demand or show cause notice was issued to petitioner nor any appeal or reference or writ petition duly admitted was pending

before any appellate authority or the High Court or the Supreme Court. No dispute warranting resolution thereof under KVS Scheme was pending between the parties since entire issue was concluded by the order of the Delhi High Court dated 9th July, 1991.

32. Mrs.Bharucha relied upon the judgment of the Apex Court in the case of **Union of India v. Charak Pharmaceuticals (India) Ltd.**, 2003 (154) ELT 354 to contend that the demand pursuant to assessment on RT-12 returns neither constituted show cause notice nor demand notice. She placed reliance on another judgment in the case of **M/s.Lajya Dyeing and Bleaching Works v. Union of India**, 2003 (155) ELT 213; wherein the Apex Court ruled that section 95 of the Excise Act makes it clear that in case where no appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court and where no application or revision is made before the Central Government, the KVS Scheme does not apply and the parties are not entitled to the benefits of said Scheme.

33. Mrs.Bharucha also tried to justify the impugned action of the Revenue on the basis of sub-clause (c) of section 95(ii) of the KVS Scheme

and submits that if ultimate action can be sustained even though on the basis of some other provisions of the KVS Scheme, this Court should not exercise discretionary writ jurisdiction in favour of the petitioner.

34. Mrs.Bharucha, without prejudice to her above submissions reiterated that even if it is found that the petitioner has some case, this Court should not exercise discretionary writ jurisdiction in favour of the petitioner since it has recovered entire duty amount from its customers. The petitioner is not expected to enrich itself through this litigation.

Issues to be determined :
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35. Having heard rival parties at length, present petition in our view, involves following issues for consideration and adjudication by this Court:

(A) Whether the designated authority, respondent No.2 herein; was justified in not considering the declaration filed by the petitioner under KVS Scheme in respect of tax arrears determined in RT-12 based on Delhi High Court decision?

(B) Whether the designated authority, respondent No.2 herein; was justified in holding that the declaration filed by the petitioner falls under the exclusion of section 95(ii)(b) of the Finance (No.2).2) Act, 1998 and rejecting the same as untenable?

(C) Whether petitioner is entitled to any relief in exercise of writ jurisdiction of this Court?

36. At the outset, we may set out brief contents of the KVS Scheme so as to reproduce the relevant portion of the scheme in order to adjudicate upon the grounds raised by the rival parties in support of their respective contentions.

Kar Vivad Samadhan Scheme (KVS Scheme):
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37. The KVS Scheme is contained in sections 86 to 98 of the Finance (No.2) Act, 1998. The object of the scheme as explained by the Finance Minister in his speech is as under:

> "Litigation has been the bane of both direct and indirect taxes. A lot of energy of the

> Revenue Department is being frittered in pursuing large number of litigations pending at different levels for long periods of time. Considerable revenue also gets locked up in such disputes. Declogging the system will not only incentivise honest taxpayers, enable Government to realise its reasonable dues much earlier but coupled with administrative measures, would also make the system more user-friendly. I, therefore, propose to introduce a new Scheme called Samadhan."

The Memorandum to Finance (No.2) Bill, 1998 thus explains the scheme:

> Kar Vivad Samadhan Scheme seeks to provide a quick and voluntary settlement of tax dues outstanding as on 31-3-1998, both in various direct tax enactments as well as indirect taxes enactments by offering waiver of a part of the arrear taxes and interest and providing immunity against institution of prosecution and imposition of penalty. The assessee on his part shall seek to withdraw appeals pending before various appellate authorities and Courts. The Scheme comes into force on the first day of September, 1998 and ends on 31st day of December, 1998. It will have following salient features.

Section 86 specifies that the Scheme may be called "Kar Vivad Samadhan Scheme, 1998". It shall come into force on the first day of September, 1998.

Section 87 defines few terms unless the context otherwise requires. The relevant ones are:

> "(e) "Disputed income", in relation to an assessment year, means the whole or so much of the total income as is relatable to the disputed tax;

(f) "disputed tax" means the total tax determined and payable, in respect of an assessment year under any direct tax enactment but which remains unpaid as on the date of making the declaration under Section 88;

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(m) "tax arrears" means,-

(i) in relation to direct tax enactment, the amount of tax, penalty or interest determined on or before the 31st day of March, 1998 under the enactment in respect of an assessment year as modified in consequence of giving effect to an appellate order but remaining unpaid on the date of declaration;

(ii) in relation to indirect tax enactment,-

(a) the amount of duties (including drawback of duty, credit of duty or any amount presenting duty), cesses, interest, fine or penalty determined as due or payable under that enactment as on the 31st day of March, 1998 but remaining unpaid as on the date of making a declaration under Section 38; or

(b) the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest, fine or penalty which constitutes the subject matter of a demand notice or a show cause notice issued on or before the 31st day of March, 1998 under that enactment but remaining unpaid on the date of making a declaration under Section 88, but does not include any demand relating to erroneous refund and where a show cause notice is issued to the declarant in respect of seizure of goods and demand of duties, the tax arrear shall not include the duties on such seized goods where such duties on the seized goods have not been quantified.

Explanation- Where a declarant has already paid either voluntarily or under protest, any amount of duties, cesses, interest, fine or penalty specified in this sub-clause, on or before the date of making a declaration by him under Section 88 which includes any deposit made by him pending any appeal or in pursuance of a court order in relation to such duties, cesses, interest, fine or penalty, such payment shall not be deemed to be the amount unpaid for the purposes of determining tax arrear under this sub-clause;

(n) All other words and expressions used and not defined in this Scheme but defined in any direct tax enactment or indirect tax enactment shall have the meanings respectively assigned to them in those enactments.

38. Sections 89 and 90 deal with the manner in which declaration has to be made and the manner in which the payment of tax arrears is to be made.

39. Section 91 provides that the designated authority shall, subject to the conditions provided in Section 90, grant immunity from instituting any proceedings for prosecution for any offence under any direct tax enactment or indirect tax enactment or from the imposition of penalty under any of such enactments, in respect of matters covered in the declaration under Section 86.

40. The provisions of Section 94 make explicitly clear that any benefit, concession or immunity to the declarant shall be available only for the year in which the declaration has been made. Further, Section 95 specifies certain circumstances, cases, situations in which the benefit of the Scheme shall not be available. Relevant part of section 95 reads as under:

> **95. Scheme not to apply in certain cases.-** The provisions of this Scheme shall not apply-
>
> (i) x x x x
>
> (ii) in respect of tax arrear under any indirect tax enactment,-
>
> (a) in a case where prosecution for any offence punishable under any provisions of any indirect tax enactment has been instituted on or before the date of filing of the declaration under section 88, in respect of any tax arrear in respect of such case under such indirect tax enactment;
>
> (b) in a case where show cause notice or a notice of demand under any indirect tax enactment has not been issued;
>
> (c) in a case where no appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court or no application for revision is pending before the Central Government on the date of declaration made under section 88.
>
> (iii) to any person in respect of whom prosecution for any offence punishable under Chapter IX or Chapter XVII of the Indian Penal Code (45 of 1860), ..., or for the purpose of enforcement of

any civil liability has been instituted on or before the filing of the declaration or such person has been convicted of any such offence punishable under any such enactment;

(iv) ....

(v) ....

In short the KVS Scheme is not made applicable in respect of indirect tax enactments in the following cases:

(i) in a case where prosecution has been launched under any indirect tax enactment;

OR

(ii) in a case where show cause notice or notice of demand under Customs Act or the Central Excise Act has not been issued. OR

(iii) in a case where no appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court or no application for revision is pending before the Central Government on the date of declaration made under section 88.

Determination of Issues :

As to Issue-A

41. Having examined the aforesaid scheme, let us now consider the submissions made by the rival parties.

. The undisputed facts emerging from the case supported on the basis of material available on record reveal that the petitioner had filed writ petition being Writ Petition No.2447 of 1990 before the Delhi High Court contending that levy of additional duty of excise under the said Act was ultras virus Articles 366(29A) read with Articles 246 and 274 of the Constitution of India and seeking to quash and set aside the notifications dated 25th November, 1987, 9th December, 1987 and 20th March, 1990 issued by respondent No.1 under the Excise Act.

42. The interim order passed by the Delhi High Court obliged the petitioner to deposit 50% amount of the disputed duty in cash. For the balance 50% amount of disputed duty the petitioner was asked to furnish bank guarantee. Accordingly, bank guarantees in the sum of Rs.35,44,614.55 were furnished by the petitioner.

43. The Delhi High Court, after hearing the parties, vide its order dated 9th July, 1991 was pleased to dismiss the petition on merits and had directed recovery of Rs.35,44,614.55 by encashing the bank guarantees with interest thereon at the rate of 17.5% per annum. The S.L.P. preferred against the said order came to be dismissed by the Apex Court. Thus, the order of the Delhi High Court achieved finality having affirmed by the Apex Court. Thus, the order of the Delhi High Court became final and conclusive.

44. Pending the decision of writ petition before the Delhi High Court, the RT-12 returns though filed by the petitioner were not assessed. However, with the dismissal of the writ petition they were finally assessed since the goods were already released under interim order on the basis of provisional assessment. Thus, the RT-12 assessment was nothing but it represented concluded determination of tax in the light of the decision of the Delhi High Court, having no impact on tax liability of the petitioner. There was no question of any tax arrears against the petitioner in view of the fact that those taxes were secured by way of bank guarantees under interim order which, ultimately, culminated in the final

order of the Delhi High Court, as such the assessment had to be governed only by the order of the High Court.

45. Apart from the above, the RT-12 assessments referable to rule 173-I of the Excise Rules were not in dispute. These assessments were never disputed by the petitioner. As a matter of fact, these assessments could not have been disputed by the petitioner since they were made by the respondents on the basis of assessable values declared by the petitioner itself. There was, thus, no dispute in respect of the said assessment order. The question of pendency of the dispute as such did not arise.

46. The endorsement made on RT-12 assessment, though at the first flush gives a picture of demand against the petitioner, but on the deeper scrutiny we find that it was nothing but an act of implementation and reiteration of the final order of the Delhi High Court passed in the writ petition referred to hereinabove; which was not open to challenge at the instance of the petitioner on any ground whatsoever; since the order of the Delhi High Court had attained finality.

47. On the above canvas of undisputed facts, to put simply, the RT-12 assessments and the endorsements made thereon though were giving colour of notices of demand but they were nothing except a step in the execution of the order of the Delhi High Court. If that be so, the question which needs consideration is whether or not such a demand can be said to be a demand of tax arrears envisaged under KVS Scheme. In order to answer this question let us dissect the provisions of the KVS Scheme.

48. Section 87 of the said scheme contains various definitions. Clause (c) defines "disputed chargeable expenditure", in relation to an assessment year, means the whole or so much of the chargeable expenditure as it related to the **disputed tax**. Clause (d) defines "disputed chargeable interest", in relation to an assessment year, means the whole or so much of the chargeable interest as is related to the **disputed tax**. Clause (g) defines "disputed wealth", in relation to an assessment year, means the whole or so much of the net wealth as is related to the **disputed tax**. Thus, all the three clauses referred to hereinabove contemplate pendency of the dispute.

49. With the above, if one turns to clause (k) of the said section, which contains definition of "person", the said clause contemplates various constituents set out therein including the person against whom proceedings have been initiated and are pending under any direct or indirect tax enactment. It is, thus, clear that pendency of the proceeding under the provisions of direct or indirect tax enactment is a must.

50. Clause (m)(ii)(a) of section 87 defines "tax arrears", in relation to indirect tax enactment, means the amount of duty, cess, interest, fine or penalty determined as due or payable under that enactment as on the 31st day of March, 1998 but remaining unpaid as on the date of making declaration under section 88. However, it does not include any demand relating to erroneous refund and where a show cause notice is issued to the declarant in respect of seizure of goods and demand of duties, and does not include the duties on such seized goods where such duties on the seized goods have not been quantified. Explanation to clause (m), however, explains that where a declarant has already paid, either voluntarily or under protest, any amount of duties, cesses, interest, fine or penalty specified

in this sub-clause, on or before the date of making a declaration by him under section 88 which includes any deposit made by him pending any appeal or in pursuance of a court order in relation to such duties, cesses, interest, fine or penalty, such payment shall not be deemed to be the amount unpaid for the purposes of determining "tax arrear" under this sub-clause.

51. Section 88 contemplates settlement of tax payable; whereas section 95 makes a provision to exclude certain cases from the purview of the scheme. This section, in our opinion, is an important provision which goes a long way to decide the fate of this petition. It, thus, warrants consideration in detail.

52. Section 95 (i) deals with respect to tax arrears under any direct tax enactment which is not applicable to the facts of this case. Now, we go to sub-clause (ii) which deals with tax arrears under indirect tax enactment since we are concerned with Excise Legislation. Clauses (b) and (c) of sub-section (ii) of section 95 (which are relevant for the purpose of deciding this petition), specifically, stipulates that in case where no show

cause notice or demand notice has been issued and in case where no appeal or reference or writ petition is admitted and pending before any appellate authority or the High Court or the Supreme Court, the provisions of the KVS Scheme will not apply. The conjoint reading of both clauses would show that either show cause notice or demand notice must have been issued against the assessee and/or appeal or reference or writ petition duly admitted by the appellate authority or the High Court or the Supreme Court must have been pending on the date of making declaration.

53. In the instant case, admittedly, no writ petition was pending on the date when the declaration was made or filed by the petitioner. No demand notice requiring the petitioner to pay disputed tax arrears was pending. What was holding the field, on the date of filing of declaration, was the endorsement on RT-12 assessment; which by no means can be said to be a notice of demand under any indirect tax enactment. That endorsement, though prima facie; at the first sight gives a picture of notice of demand but on deeper scrutiny we find that it was not a notice of demand since no demand was pending against the petitioner on that date. In any

event a demand was raised in the light of the concluded decision of the Delhi High Court. The bank guarantees did not remain actionable claim. It culminated in a decree of the Court in the nature of mandamus; wherein encashment of bank guarantees was ordered with further order to pay interest thereon @ 17.5% p.a. It becomes a property of the Revenue.

54. In order to make the record straight and for the purposes of accounting, it was necessary to pass final assessment order based on the concluded decision of the Delhi High Court so as to adjust the amount of bank guarantees against the duty amount. So just to show execution of the order in the nature of writ or decree passed by the Delhi High Court and to report compliance thereof, or in other words, to report compliance of the writ issued by the Delhi High Court, the RT-12 assessments with necessary endorsements thereon were necessary. Those orders were nothing but were in the nature of execution of the order of the Delhi High Court; whereby the dispute between the parties for all time to come; came to be settled; as such no dispute warranting settlement of any dispute under KVS Scheme was pending. No dispute was pending or involved on the factual matrix of this case, as such, in the facts

of this case, KVS Scheme or benefits thereof were not available to the petitioner. The submissions made in this behalf by Mrs.Bharucha appearing for the Revenue deserves acceptance in toto.

55. Having taken over all survey of facts and circumstances with material available on record, we confirm that the designated authority was perfectly justified in not considering rather rejecting the declaration filed by the petitioner under the KVS Scheme.

As to Issue-B :
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56. The KVS Scheme makes a specific provision under section 95 of the Finance Act to exclude certain cases of "tax arrears" under direct and indirect tax enactments as already indicated in para-36 (supra). The impugned order of the designated authority - respondent No.3 takes a view that no show cause notice or demand notice under any indirect tax enactment was issued to the petitioner. While considering the facts and recording our findings on issue 'A', we have already reached to the conclusion that neither show cause notice nor any notice of demand as contemplated under the KVS Scheme was ever issued to the petitioner. Let us

now consider what type of notice of demand is envisaged under the Finance Act or KVS Scheme. In order to find out the nature of notice of demand envisaged under the KVS Scheme once again it is necessary to turn to consider the objects of the finance Act, 1998 extracted in para-33 (supra).

57. The purpose of the Scheme is to provide quick and voluntary settlement of tax dues outstanding as on 31st March, 1998 by offering waiver of tax arrears and interest and providing immunity against institution of prosecution and imposition of penalty. The objects of the Scheme explained by the Finance Minister in his speech as extracted in para-33 (supra) can be looked into as evidence of the circumstances which necessitated the enactment to find out the object behind it (see **Charanjeetlal Choudhary v. Union of India**, 1951 SC 41 and **K.P.Verghese v. I.T.O.**, AIR 1981 SC 1922). The Finance Minister's speech also makes it clear that the scheme was framed to save energy of the Revenue Department which is being frittered in pursuing large number of litigations pending at different levels for a long period of time. In order to unlock the considerable revenue locked in the litigations at various levels a new scheme was

introduced by way of "Samadhan" i.e. for settlement of dispute. The idea was to settle the disputes. Therefore, the notice of demand contemplated under the KVS Scheme is in respect of a demand which is in dispute either before original authority or the appellate authority or revisional authority under the indirect tax enactment or the High Court or the Supreme Court.

58. We get the above indication from clause (c) of sub-section (ii) of section 95 of the Finance Act; which, specifically, provides that in a case where no appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court or no application for revision is pending before the Central Government on the date of declaration made under section 88, the KVS Scheme shall not apply. Meaning thereby, for applicability of the Scheme a dispute between the parties must be pending in any of the forums referred to in the said section. In order to understand the concept of pendency of litigation let us consider what types of litigations are contemplated under the said Scheme. Reading the scheme as a whole in the light of the purpose and objects of the scheme what is contemplated is

pending litigation which needs resolution (Samadhan).

59. Now one more question which needs to be addressed is: "whether the execution proceedings to execute final and conclusive order wherein there is no dispute involved would fall within the sweep of the said Scheme?" In our considered opinion, the answer has to be in negative. There are bound to be certain cases wherein writ petitions or special leave petitions or appeals may have been finally disposed of by the superior Court or authority settling the dispute finally for all time to come. Such orders are required to be executed. Pursuant to the finality of the orders in execution; if notice of demand is issued, could it be said to be a demand of disputed amount. In such cases, can KVS Scheme be put in operation; so as to reopen the issues finally settled by the Court of the competent jurisdiction. If the said scheme is held applicable, even to the matters concluded by the judgments or final orders of the Court, it amounts to stating that the decision of the Court is not binding and will result in reverting or nullifying the decision made in exercise of judicial power.

60. A statute as is well-knwon must be interpreted having regard to the purpose and object which it seeks to achieve. In **Associated Timber Industries and Others v. Central Bank of India**, (2000) 7 SCC 93, while considering the provisions of the Bombay Money Lenders Act vis-a-vis the provisions of other Act upon a purposive and meaningful interpretation held that the banks do not come under the purview of the Assam Money Lenders Act.

61. The Court while interpreting the provisions of a statute, although, is not entitled to re-write the statue itself, is not debarred from "ironing out the crease". The court should always make an attempt to uphold the rules and interpret the same in such a manner which would make it workable.

62. In **S.Gopal Reddy v. State of Andhra Pradesh**, (1996) 4 SCC 596 this Court observed as under:

> "It is a well-known rule of interpretation of statutes that the text and the context of the entire Act must be looked into while interpreting any of the expressions used a

> statute. The courts must look to the object which the statute seeks to achieve while interpreting any of the provisions of the Act. A purposive approach for interpreting the Act is necessary."

63. In the instant case, the judgment and order of the Delhi High Court passed in Writ Petition No.2447 of 1990 has become final and conclusive with the dismissal of the petition followed by dismissal of S.L.P.; wherein the bank guarantees furnished by the assessee/ petitioner culminated into enforceable decree in the nature of writ of mandamus, as such, in our view, no dispute with respect to the tax arrears was pending. In the instant case, what was pending was only a formal assessment order to be passed merely on the basis of the returns filed by the petitioner; which was nothing but a formality to be completed to make the record complete. In such event, if any formal demand notice in execution of the final order is issued just to record satisfaction of the amount already recovered, or secured by way of bank guarantees; can such demand notice be said to be a notice of demand raising dispute as contemplated under section 95(ii)(b) of the KVS Scheme. In our view, such notice of demand issued by making endorsement on RT-12 assessment may be a notice of demand as ordinarily understood but

not as contemplated under the KVS Scheme. Therefore, the impugned order is perfectly legal and valid.

64. Even otherwise, alternatively, assuming but not accepting that the contention of the petitioner is correct that RT-12 assessment constituted notice of demand, even then, the declaration of the petitioner would be hit by clause (c) of section 95(ii) of the KVS Scheme as no proceedings contemplated under the said clause were pending on the date of declaration made under section 88 of the said Scheme. What was pending was a writ petition at the instance of the Revenue, challenging the order passed by the appellate civil Court passed in a civil appeal filed against the order passed by the Civil Court in the civil suit seeking injunction restraining the respondents (defendants therein) from enforcement of the terms of the bank guarantees furnished by the petitioner, which was nothing but an independent and separate contract of guarantee between the parties to the contract.

65. The pendency of the writ petition contemplated under section 95(ii)(c) is a writ petition arising out of an order passed in appeal

and/or reference and/or revision passed under the provisions of the indirect tax enactment. The civil suit has been specifically excluded from the purview of the provisions of KVS Scheme. Consequently, it would be reasonable to infer that the writ petition arising from the civil suit has also been excluded and, therefore, no proceedings as contemplated under clause (c) of section 95(ii)(c) were pending the in the instance case on the date of declaration made by the petitioner under the KVS Scheme.

66. At this juncture, we may make references to the submission made by Mr.Shridharan relying upon the judgment in the case of **Mohinder Singh Gill v. Chief Election Commissioner**, AIR 1978 SC 851 to contend that no other ground other than the mentioned in the order can be used to sustain the statutory order. It is true that the validity of the order under challenge has to be examined on the basis of the reasons mentioned in the order. By filing additional affidavit, invalid order cannot be validated on the basis of non-existing ground but so far as the case at hand is concerned, the impugned order is not being made valid on the basis of the ground which was not in existence on the date when the declaration was made under section 88. The fact

that the impugned order specifically refers to the ground contemplated under section 95(ii)(c), even if not applicable, will not make the order invalid on that ground as has been held by the Apex Court in the case of **J.K.Steel Ltd. v. Union of India**, (1969) 2 SCR 481 = AIR 1970 SC 1173; wherein it was observed as under:

> " If the exercise of a power can be traced to a legitimate source, the fact that the same was purported to have been exercised under a different power does not vitiate the exercise of the power in question. This is a well settled proposition of law. In this connection reference may usefully be made to the decisions of this Court in P.Balakotaiah v. The Union of India, (1958) SCR 1052 = (AIR 1958 SC 232); and Afzal Ullah v. State of U.P. (1964) 4 SCR 991 = (AIR 1964 SC 264)."

It is needless to mention that where a decision is arrived at for a wrong reason, but the same decision must as a matter of law has been arrived at if the right reason had been relied on, the decision will not be quashed. In the instant case the impugned order can be sustained jointly and severally on the basis of both grounds i.e. the exclusion clauses incorporated in clauses (b) and (c) of section 95(ii). Even otherwise, if no writ petition was pending, then there was no question of any demand being pending for adjudication. Therefore, the view taken by respondent No.3 can very well be sustained

on the basis of either of the above clauses. Issue "B", accordingly, stands answered.

As to Issue-C :

67. In view of the peculiar facts of the present case, we do not think it would be sound exercise of discretion on our part to upset the impugned decision and allow this petition so as to enrich the petitioner sheerly by allowing it to indulge in series of litigations. In this behalf, it would be useful to refer to the judgment of the Delhi High Court in the case of the petitioner itself; wherein it was observed as under:

> We find that for the petitioners perhaps litigation is business. After getting interim orders they find they are nothing to lose except in the shape of fees payable to counsel. They have collected additional duties of excise from the ultimate consumers but have not repaid the same to the credit of the Central Government and they thus utilised half of the duty so collected for their own purposes. The interim orders which the petitioners have obtained have adversely affected the States who are not parties to these petitions and were entitled to the share of the revenue levied and collected under the Act but would certainly have been deprived of the same all this period because of the stay. Petitioners cannot be permitted to make profit at the cost of public revenue. The petitioners must restore the advantage they had over the respondents because of the stay they enjoyed and consequently deprived the respondents of their lawful revenues during the period of stay operated against them. During the

course of hearing of these petitions we were informed by learned Additional Solicitor General that a sum of Rs.700 crores has become due from the petitioners towards the additional duties of excise because of the stay. The amount is really staggering. Because of the view we have taken the petitioners were not entitled to withhold this amount after having collected the same from the consumers by way of additional duties of excise and then utilise the same for their own business purposes. We are told that the bank rate of interest is 17-1/2% per annum on commercial transaction as it was and we are of the opinion that not only that the respondents should be allowed to encash the bank guarantees forthwith, they should also be entitled to interest on these amounts at the rate of 17.1/2% per annum from the date the duty became payable but was stayed under the orders of this Court."

(Emphasis supplied)

68. If we were to allow this petition and set aside the order passed by respondent No.3 the result would be that the declaration furnished by the petitioner would be restored. In that event, unlawful and illegal declaration will get validated. If that be so, this Court is not expected to exercise writ jurisdiction in such case. It can safely be said that there has been no failure of justice in the present case. We would be justified in rejecting this writ petition considering absence of equity in favour of the petitioner.

69. One more judgment which concludes the issue at hand is the judgment of the Apex Court in the case of **Sahakari Khand Udyog Mandal Ltd.** (supra); wherein the Apex Court, after taking survey of various judgments delivered by it, invoked doctrine of unjust enrichment to deny the benefit of exemption and refund of duty in the following words:

> 48. From the above discussion, it is clear that the doctrine of 'unjust enrichment' is based on equity and has been accepted and applied in several cases. In our opinion, therefore, irrespective of applicability of Section 11B of the Act, the doctrine can be invoked to deny the benefit to which a person is not otherwise entitled. Section 11B of the act or similar provision merely gives legislative recognition to this doctrine. That, however, does not mean that in absence of statutory provision, a person can claim or retain undue benefit. Before claiming a relief of refund, it is necessary for the petitioner/appellant to show that he has paid the amount for which relief is sought, he has not passed on the burden on the consumers and if such relief is not granted, he would suffer loss.
>
> 49. In the present case, not only no such case has been made out by the appellant-Mandal, the position is to the contrary. All the authorities below have expressed recovered a finding that the appellant-Mandal has recovered the amount from consumers and as such excise duty is passed on the consumers/customers. In view of specific finding, in our opinion, the conclusion is inescapable that the appellant-Mandal is not entitled to claim any amount. allowing exemption or refund of amount would result in 'unjust enrichment' by the appellant which cannot be permitted. In our opinion, therefore, even on that count, orders passed by the authorities and refusal to grant benefit cannot be held

arbitrary, unreasonable or inequitable. The said ground also, therefore, has to be rejected.

70. The aforesaid judgment of the Apex Court in clearest possible term has held that the doctrine of unjust enrichment is based on equity and the same is applicable irrespective of application of section 11B of the Central Excise Act. Such similar provision merely gives recognition to the equitable doctrine of unjust enrichment. Absence of statutory provision does not mean that, a person can claim or retain undue benefit. Before claiming a relief of refund, the person claiming refund must show that he has paid the amount for which relief is sought; that he has not passed on the burden on the consumers and that if such relief is not granted, he would suffer loss.

71. In the instant case it is not in dispute that the petitioner has recovered the amount of duty from its customers. In view of this undisputed fact, it is an academic debate as to whether or not the show cause notice or demand notice was issued to the petitioner. Irrespective of the applicability of the KVS Scheme no writ jurisdiction can be invoked in favour of the petitioner.

72. This bench in the case of **Bussa Overseas and Properties Pvt.Ltd.** (supra) had an occasion to non-suit the petitioner on the touchstone of doctrine of unjust enrichment; wherein this Court ruled as under:

> " Even otherwise, while exercising the Writ jurisdiction, if the Writ Court finds that any direction to refund results in unjust enrichment to the Petitioner, then it is open to the Writ Court to decline to exercise its Writ jurisdiction, even though the Petitioner has a right to obtain refund. This reasoning of ours is supported by the Full Bench decision of this Court in the case of New India Industries v. Union of India reported in 1990 (46) E.L.T. 23 (Bom.) = 1990 (1) BCR 515, as well as the decision of the Apex Court in the case of Mafatlal Industries Ltd. (supra at Para 95). In the present case, admittedly, the Petitioners have passed on the incidence on duty to the customers and have recovered the amount due to them. In this view of the matter, we declined to issue Writ in favour of the Petitioners."
>
> (Emphasis supplied)

73. The power under Article 226 has to be exercised to effectuate the regime of law and not to abrogate it. While exercising writ jurisdiction this Court cannot ignore that exercise of power under Article 226 will result in enriching the petitioner and allowing him to retain the amount of duty which it had already collected from its

customers. In this view of the matter, we decline to issue writ in favour of the petitioner.

74. In the above view of the matter, this petition deserves to be dismissed. In the result, petition is dismissed with no order as to costs.

(J.P.DEVADHAR, J.) **(V.C.DAGA, J.)**